



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60, 61, 63, 70 and 72

[EPA-R08-OAR-2018-0299; FRL-9985-72-Region 8]

Proposed Approval of Recodification and Revisions to State Air Pollution Control Rules; North Dakota; Proposed Interim Approval of Title V Program Recodification and Revisions; Proposed Approval of Recodification and Revisions to State Programs and Delegation of Authority to Implement and Enforce Clean Air Act Section 111 and 112 Standards and Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or the “Agency”) has reviewed changes to the North Dakota Air Pollution Control Rules. Concluding review of those changes, the EPA is proposing interim approval of revisions to the North Dakota operating permit program for stationary sources subject to title V of the Clean Air Act (CAA or the “Act”) and recodification of the title V program under a new title of the North Dakota Administrative Code (NDAC). This document also proposes approval of North Dakota’s revision and recodification of the State’s programs for implementing and enforcing delegated requirements under certain sections of the Act, and consequentially the means for the Agency’s proposed approval of a revised delegation arrangement between the EPA and the State of North Dakota for transfer of authority to regulate sources under those sections. Upon final approval of this rulemaking action North Dakota will receive delegation of authority to implement and enforce CAA section 111 New Source Performance Standards (NSPS) and section 112 National Emission Standards for Hazardous Air Pollutants (NESHAP), including Maximum Achievable Control Technology (MACT) requirements within the state, excluding Indian country, exactly as the requirements

were promulgated by EPA (i.e., “straight delegation”). Straight delegation of sections 111 and 112 authorities does not include those authorities reserved by the EPA Administrator or otherwise reserved by the EPA, nor the authority to implement and enforce regulations not incorporated unchanged into state code, and does not include those regulations unincorporated by North Dakota and omitted from the State’s request for delegation. Upon finalization of this rulemaking, North Dakota will also continue to be eligible for future automatic delegation of incorporated, unchanged federal requirements, without need for request of Agency approval on a case-by-case basis. The proposed action effects the transfer of title V program administration and delegated authority to implement and enforce sections 111 and 112 requirements from the North Dakota Department of Health (NDDH) to the newly created North Dakota Department of Environmental Quality (NDDEQ or the “Department”). The EPA is taking these actions pursuant to sections 501-506, 111 and 112 of the Act.

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R08-OAR-2018-0299 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from www.regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the

web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. The EPA requests that, if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Gregory Lohrke, Air Program, EPA, Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129; (303) 312-6396; lohrke.gregory@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background Information

The North Dakota Century Code (NDCC) currently designates the NDDH as the primary state environmental agency (NDCC 23-01). The North Dakota health department's authority to administer and implement the North Dakota Air Pollution Control Rules is codified in NDAC Article 33-15. On April 7, 2017, the Governor of North Dakota signed legislation to amend the NDCC for the creation of the NDDEQ and initiate the transfer of all authority, powers and duties

of the NDDH related to environmental quality to the new Department.¹ The migration of legal and implementation authority, from the NDDH and to the new Department, required North Dakota to revise the NDAC to codify the NDDEQ's source of legal, jurisdictional and enforcement authority, and to define the programs and regulations that the NDDEQ will implement. The creation of the NDDEQ also requires the State to seek EPA approval for the migration of these authorities and all amendments to related programs and agreements. On August 6, 2018, North Dakota, having recodified the state environmental regulations,² submitted to the Acting Administrator a request for approval of the revision and transfer of the State's CAA programs as they will be administrated by the NDDEQ. Among the duties of the new NDDEQ is the implementation and enforcement of the North Dakota Operating Permits Program and programs implemented via that program including the Act's section 111 and 112 standards and a program for implementation of Title IV of the Act, all of which the EPA had previously approved and delegated to the State in prior rulemaking actions. In these prior actions we determined that NDDH met, among other things, the relevant statutory and regulatory authority and the ability to implement and enforce the operating permits program.

After the EPA receives a program revision, the Administrator shall approve or disapprove program revisions based on the requirements of part 70 and the Act.³ In addition to the recodifications to the State's title V permitting program, the State's submittal includes recodifications of the programs for implementation and enforcement of delegated section 111 and 112 standards and requirements. The recodification and minor revisions to North Dakota's

¹ North Dakota Session Laws 2017, Ch. 199, § 1 (Senate Bill 2327).

² For reference here and throughout today's notice concerning the renumbering and recodification of NDCC and NDAC provisions relevant to the transfer of CAA authorities to the NDDEQ, see the general guidance document, "Crosswalk on Recodifications of Relevant NDCC and NDAC Sections," available in the docket for today's notice.

³ 40 CFR 70.4(i)(2).

section 111 and 112 programs also requires the EPA to determine whether to make minor revisions to the delegation arrangements concerning those programs. North Dakota's rules authorizing the NDDEQ to administer the State's environmental programs only become effective after the State receives the necessary federal approvals.⁴ North Dakota's operating permit and source requirements become federally enforceable on the effective date of final approval of this rulemaking action.

II. Summary of North Dakota's Title V Program Recodification and Revisions

A. Introduction

Title V of the 1990 CAA amendments directed the EPA to develop and promulgate rules that define the necessary elements of an approvable state operating permits program and the necessary standards and procedures by which the EPA will approve, oversee, and, when necessary, withdraw approval of a state's permitting authority under such programs. These operating permit program requirements are codified at 40 CFR part 70 (part 70). Title V also directs states to develop and submit to the EPA approvable programs for the issuance of operating permits to all major stationary sources and to certain other sources within the state's jurisdiction. Part 70 includes the procedure for state requests to the EPA for approval of revisions to the state's operating permit program (§70.4(i)), and for EPA approvals of partial or complete transferal of permitting authority from one state agency to another (§70.4(i)(2)).

⁴ EPA's proposed approval actions on North Dakota's submittal to transfer its Title V Program approval and its delegated authority for the NESHAP, MACT and NSPS from the North Dakota Department of Health to the North Dakota Department of Environmental Quality does not extend to Indian country as defined in 18 U.S.C. Section 1151. Indian country generally includes (1) lands within the exterior boundaries of the following Indian reservations located within North Dakota: the Fort Berthold Indian Reservation, the Spirit Lake Reservation, the Standing Rock Sioux Reservation, and the Turtle Mountain Reservation; (2) any land held in trust by the United States for an Indian tribe; and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. Section 1151. The EPA, or eligible Indian tribes, as appropriate, will retain responsibilities under CAA Sections 501-506, 111, and 112 for air quality in Indian country.

North Dakota received interim approval of its operating permit program effective on August 7, 1995 (60 FR 35335). The State later received final, full approval effective on August 16, 1999 (64 FR 32433). On August 6, 2018, the State of North Dakota submitted to the EPA a formal request for approval of all operating permit program recodifications and revisions, for transferal of permitting authority to the NDDEQ, along with requests for approvals of delegations of authority for other related programs under the Act (*See* sections III and IV of this notice).⁵ The submittal included a modified program description, documentation of rulemaking procedures followed, including public comment documentation, and copies of the relevant sections of recodified and revised state regulations.⁶ This submittal was supplemented on August 16, 2018, with an Attorney General's opinion describing the NDDEQ's legal authority to administer and enforce aspects of the operating permit program under part 70 and title V of the Act.⁷ North Dakota is not resubmitting the operating permit program, rather the State is only updating the numbering of its operating permits program and related amendments that have previously been approved by the EPA. Therefore, except for the minor changes to the regulations analyzed in Section II.B.4, this notice proposes action on the recodification and amendments as appropriate and consistent with the transfer of authority and change in name and does not re-approve the substantive State regulations.

B. Analysis of State Submittal

⁵ The submittal package, "Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality," is available for public review in the docket for today's notice.

⁶ For purposes of cross-referencing a recodified provision of the NDAC air pollution control rules with its previous version, we note that the recodification followed a consistent scheme: all rules previously codified as 33-15-xx-xx are now codified as 33.1-15-xx-xx. For example: all Title V Permit to Operate provisions previously codified under NDAC section 33-15-14-06 are now codified at corresponding subsections of NDAC section 33.1-15-14-06.

⁷ The Attorney General's statement, "Attorney General's Opinion Operating Permits Program," is available for public review in the docket for today's notice.

The EPA finds the State of North Dakota's modified operating permits program submittal to be administratively complete for requesting approval of recodification and revisions to the State's program and the transfer of all authorities related to the permitting program to the newly created NDDEQ. This determination was made with reference to the criteria for administrative completeness found in 40 CFR part 70. An accounting of specific, required submittal elements for revisions to state operating permit programs and transfers of authority to new state agencies are in 40 CFR 70.4(i)(2). This section specifies the submittal requirements for any state-initiated program revision as being: (1) a modified program description; (2) an Attorney General's statement; and (3) such other documents as EPA determines to be necessary (70.4(i)(2)(i)). Additional evaluation criteria specific to initial program submittals, used as supplemental criteria in the EPA's review of the necessary submittal elements, are found under §70.4(b).

1. Program Description

As required under 40 CFR 70.4(i)(2)(i), the State of North Dakota included in its request for approval of revisions to its operating permit program a description of how the NDDEQ intends to carry out its responsibilities under part 70 and title V of the CAA (see criteria for program descriptions at §70.4(b)(1)). The State's program description outlines both the basis for operating permit program implementation and the organizational structure of the NDDEQ's Division of Air Quality. The program description also includes job classification descriptions for all staff positions responsible for carrying out the operating permits program under the NDDEQ's air quality division. Implementation of the North Dakota title V program will be based on implementation authority granted by the relevant sections of NDAC article 33.1-15, as

submitted to the EPA for review.⁸ The NDDEQ also provides that it will generate guidance and policy documents to clarify the bounds and details of this implementation authority.⁹ The Department's organizational structure is explained within the submittal in both narrative and graphical form.¹⁰ The Division is equivalent in form and substance to, and entirely replaces, the Environmental Section of the NDDH, which the EPA previously approved (64 FR 32433). The State has historically also demonstrated adequate resources and capabilities for implementation and enforcement of the State title V program, and identified no new divisions of relevant authorities created by the transfer of powers to the NDDEQ (§70.4(i)(2)). Therefore, we propose to approve the program description information as appropriate and consistent with the transfer of authority.

2. Attorney General's Statement

Title 40 CFR 70.4(b)(3) enumerates the necessary elements of the Attorney General's statement required for program revisions covered by §70.4(i)(2)(i). These elements are necessary to ensure that the State operating permit authority receiving transfer of the title V program has the complete legal authority to carry out the requirements of a part 70 program. This includes, but is not limited to, the authority to: issue permits and assure source compliance with each applicable requirement and requirement of part 70; incorporate monitoring, recordkeeping, reporting and compliance certification requirements into permits; incorporate into permits all applicable requirements and part 70 requirements; terminate, modify, or revoke and reissue permits for cause; enforce permits, permit fee requirements, and the requirement to obtain a permit; make available to the public any permit application contents: compliance plan, permit,

⁸ See submittal package document, "Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality" at section 1.A.

⁹ *Ibid.*

¹⁰ *Ibid.* at sections 1.B and 1.C

and monitoring and compliance certification report; not issue a permit if the Administrator objects to its issuance in a timely manner or, if the permit has not already been issued, to public petitions to the EPA; and insure the opportunity for judicial review of permit actions under the conditions outlined in part 70 (40 CFR 70.4(b)(3)(i)—(xiii)).

North Dakota's Attorney General's statement provides descriptions of the legal authority under the recodified laws and regulations of the State to carry out all aspects of an operating permits program, including the authority to carry out each of these preceding elements.¹¹ The statement includes citations to the relevant State laws and regulations that grant these authorities, that provide the corresponding requirements of the Act and federal regulations of part 70.

During North Dakota's review of the NDAC for recodification and submittal to the EPA, the State discovered limitations on the opportunity for judicial review in State courts. The EPA regulation for state operating permit programs outlines the conditions and requirements for granting affected parties the opportunity to appeal for judicial review in state courts (40 CFR 70.4(b)(3)(x) – (xii)). The Attorney General's opinion explains that while State law provides for opportunity for judicial review for most of the requirements in 40 CFR 70.4(b)(3)(x)-(xii), the provisions are overly limited. The opinion explains that the State intends to revise its rules to remedy the limitations on judicial review:

Forthcoming Department rules will provide that if the final permit action being challenged is the Department's failure to take final action, a petition for judicial review may be filed at any time before the Department denies the permit or issues the final permit; and that where petitions for judicial review are based solely on grounds arising

¹¹ For purposes of representing the necessary elements of an acceptable Attorney General's opinion (§ 70.4(b)(3)(i) – (xiii)), and how the submitted Opinion presents those elements and demonstrates the State's legal authority through the recodified, relevant sections of its NDCC and NDAC, please reference the documents, "Attorney General's Opinion Operating Permits Program," and, "AG Opinion Review," found in the docket for today's notice.

after the 30-day deadline for judicial review, such petitions may be filed no later than 30 days after the new grounds for review arise.¹²

The statement concludes by explaining that “an addendum to the opinion will be submitted once these rules are adopted.” Therefore, while State law grants the Department authority to grant petitioners the right to some opportunities for judicial review, Department rules limit the full authority required under 40 CFR 70.4(b)(3)(x) – (xii) (NDCC §§23.1-01-11, 23.1-06-04(1)(l), 28-32-42; NDAC §33.1-15-14-06(8)). The EPA proposes to find that the Attorney General’s statement is appropriate and consistent with the transfer of authority, except for the limitations on judicial review under title V and §70.4(b)(3)(x) – (xii) described in the Attorney General’s opinion. The effects of these limitations on the EPA’s proposed action are discussed in section II.C of this document.

3. Supporting Documents

The transfer of permitting program authorities to the newly created Department will be accompanied by a transfer of all related program operations as they have existed under the authority of the NDDH. Since the North Dakota title V program is reasonably assumed to operate in the future as it has since full program approval in 1999, the EPA asked for no additional supporting documents, such as would be required for initial program submittals under 40 CFR 70.4(b)(4) – (16), except for the relevant NDCC and NDAC sections as revised and recodified for program transfer. With the exception to the revisions needed to the regulations discussed in section II.B.4 of this notice, we propose to find that the recodified regulations are substantively equal to those the EPA previously approved for implementation and enforcement of the State’s operating permit program, the structure and operations of the implementing

¹² *Ibid.*

authority can be assured to continue in a similar, adequate manner as they did under the NDDH, and the relevant NDCC and NDAC sections are appropriate and consistent with the transfer of authority.

4. Analysis of the State's Prior Unapproved Amendments to NDAC 33-15-14-06

Since the full approval of North Dakota's title V operating permit program in 1999 (64 FR 32433), the State has made several minor changes to the section of North Dakota regulations that provide the legal authority to implement and enforce such a program. North Dakota made most of these amendments to NDAC section 33-15-14-06 to bring its regulations into alignment with the federal part 70 operating permit program requirements as amended between 1999 and the present.¹³ The EPA proposes to approve the State's previously unconsidered program amendments as listed below for the following reasons:

- Under subsection 1 ("Definitions"), three paragraphs were added to reflect the EPA's amendments to 40 CFR 70.2. Two paragraphs add new definitions for "Approved replicable methodology (ARM)"¹⁴ and "Alternative operating scenario (AOS),"¹⁵ in accordance with the EPA's 2009 revisions to the part 70 regulations (74 FR 51417). The third paragraph was added to account for the EPA's 2010 addition of a definition for "Subject to regulation"¹⁶ to §70.2 (75 FR 31513). The State made conforming amendments to its Definitions to incorporate these additions (e.g., when the new definition for AOS was added, by inserting 33-15-14-06.1.d, with all of the subsequent definitions amended to maintain alphabetical order: 33-15-14-06.1.d

¹³ For the purposes of cross-referencing pre-submittal revisions to NDAC 33-15-14-06 (title V program) with the recodification of those revisions under NDAC 33.1-15-14-06, and a comparison of how these revisions reflect the EPA's amendment of 40 CFR part 70 during the years between initial, full approval of North Dakota's title V program and the present, please see the document, "Post-1999 Amendments to North Dakota Title V Program," in the docket for today's notice.

¹⁴ NDAC 33.1-15-14-06.1.f.

¹⁵ 33.1-15-14-06.1.d.

¹⁶ 33.1-15-14-06.1.cc.

became 33-15-14-06.1.e, and so forth). North Dakota has also amended the definition of “Major source” under this subsection to reflect the exact 2001 EPA revisions to the major source definition under 40 CFR 70.2 (66 FR 59161);

- Under subsection 4 (“Permit applications”), several paragraphs, along with specific language, were removed relating to the timeline for initial title V permit applications, which the State explains no longer apply to any source in North Dakota and are no longer necessary. Two paragraphs were added to specify requirements for a description and compliance schedule for source requirements associated with a proposed AOS, to be included in the compliance plan for all title V sources submitting operating permit applications (paragraphs 4.c.(8)(b)[4] and (c)[4]). The State made these additions, as well as limited revisions to various paragraphs (33-15-14-06.4.c(2), (3)(c) and (7)) under this subsection,¹⁷ to accommodate permit applications from sources with an AOS after the EPA’s 2009 revisions to part 70 regulations (74 FR 51417). The limited revisions to these three paragraphs were made to reflect the changed language of their federal regulation corollaries (40 CFR 70.5(c)(2), (3)(iii) and (7)) after the 2009 CFR revisions;
- Under subsection 5 (“Permit content”), North Dakota revised the language of paragraphs a.(1) and a.(9) to account for the EPA’s revisions to various part 70 requirements attendant to the addition of definitions for ARM and AOS. These changes were made in accordance with the EPA’s 2009 revisions to part 70 regulations (74 FR 51417). These two paragraphs incorporate paragraphs 40 CFR 70.6(a)(1) and (a)(9), as revised in 2009 with minor terminology changes to accommodate reference to the North Dakota Program instead of a generalized state program. The State also revised language under paragraph c.(5)(c)[2] of this subsection to clarify and update compliance certification requirements in accordance with the EPA’s 2014 revisions to section

¹⁷ Docket item: “Post-1999 Amendments to North Dakota Title V Program.”

70.6 (79 FR 43661). This paragraph incorporates 40 CFR 70.6(c)(5)(iii)(B), as revised in 2014 with minor terminology changes to accommodate reference to the North Dakota Program and the State's air quality control rules instead of a generalized state program and the CFR;

- Under subsection 8 (“Judicial review of title V permit to operate decisions”), the State added the subsection by adding paragraphs 8.a through 8.e to codify most of the legal authority to provide judicial review of permit decisions as required of state operating permit programs and described under section 70.4(b)(3)(x)—(xii); and
- Under subsection 10 (“Compliance assurance monitoring”), North Dakota incorporated by reference the compliance assurance monitoring (CAM) regulations of 40 CFR part 64 with minor revisions to three definitions used in part 64 to insure the State's delegated implementation and enforcement authority regarding those regulations.
- Additionally, the EPA promulgated amendments to the part 70 regulations that North Dakota has not adopted and the EPA proposes to find that it was not necessary for the State to adopt these amendments.¹⁸

North Dakota's revised title V program submittal includes all amendments to NDAC section 33-15-14-06 as they have been incorporated into the recodification of North Dakota's title V permitting regulations at NDAC 33.1-15-14-06. These amendments were made to either directly reflect the EPA's amendments to the federal part 70 regulations during the years since North Dakota's full program approval (64 FR 32433) or as North Dakota-specific amendments. All of the State's amendments, except for those to NDAC subsection 33-15-14-06.8 and its successor, the limitations of which are discussed in section II.B.2 of today's notice, are found to

¹⁸ A table of these EPA 40 CFR part 70 revisions and justification for North Dakota, not including the revisions in the State's operating permits program, may be found in the document, “EPA Amendments to Part 70 Not Adopted,” included in the docket for this action.

be approvable. Many of these changes were made to bring state regulations into accord with the EPA's changes to part 70 requirements over that time period. The remaining changes to NDAC 33-15-14-06 were not in response to modified federal regulations; however, the State's changes do not create an operating permits program any less stringent than is required under 40 CFR part 70. We propose to find that all previously unapproved amendments to the North Dakota Program between full approval and the transfer of authority to the NDDEQ, as they have been recodified under NDAC 33.1-15-14-06, are approvable for the purposes of part 70 program implementation and enforcement.

5. Transfer of the Acid Rain Program

North Dakota's request for transfer of the title V operating permit program includes the request to transfer associated State responsibilities for the CAA title IV Acid Rain Program (40 CFR parts 72, 75 and 76).¹⁹ 40 CFR 70.4(b)(3)(xiii) specifies that the attorney general's legal opinion ensure that the authority of the state permitting agency is not used to modify the acid rain program requirements. The EPA issued guidance to clarify the primary criteria for approval of state submittals to carry out the acid rain portion of the operating permits program.²⁰ The Attorney General opinion assures that "State law is consistent with, and cannot be used to modify, the Acid Rain Program requirements of 40 CFR part 72."²¹ NDCC 23.1-06-04(1)(l); NDAC 33.1-15-21. Additionally, North Dakota's revised title V program submittal demonstrates adequate legal and regulatory authority to issue permits that reflect the requirements of title IV of

¹⁹ Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality; see Governor's letter and section 1.B.

²⁰ EPA Memorandum, "Title IV-Title V Interface Guidance for States," from Lydia Wegman, Deputy Director, Office of Air Quality Planning and Standards and Paul Stolpmann, Acting Director, Office of Atmospheric Programs, to EPA Air Division Directors, included in the docket for today's notice.

²¹ Attorney General's Opinion Operating Permit Program, August 16, 2018, p. 9.

the Act.²² North Dakota will continue to implement an acid rain program through the NDDEQ substantively equal to the program approved with the original interim title V program approval (*See* 60 FR 20945). Because of the substantively equal authorities and capabilities of the NDDH and the NDDEQ, North Dakota has reasonably assured the EPA of its ability to meet the requirements related to title IV of the Act, through the issuance and enforcement of title V operating permits. Therefore, we propose to approve the transfer of the acid rain program as appropriate and consistent with the transfer of authority.

C. Proposed Action

North Dakota's program meets the minimum requirements and otherwise substantially meets the part 70 requirements²³, but is not fully approvable because as described in section II.B.2 the Attorney General Opinion explains that the State's rules lack full authority required for judicial review.²⁴ Therefore, the EPA proposes interim approval of the State's operating permit program under 40 CFR 70.4(d) and CAA section 502(g). An interim approval of North Dakota's operating permit program would solely be to allow the State to make minor revisions to NDAC 33.1-15-14-06.8, and update the Attorney General's opinion to reflect revised legal authorities, as a precursor to full approval of the State's operating permit program (See discussion in section II.B.2 of this notice). The EPA will act as expeditiously as possible to finalize full approval of North Dakota's title V program once the revised State rules and Attorney General's opinion are submitted to the EPA. Proposed interim approval shall not be construed as approving any deviation from the implementation and enforcement requirements under part 70 or as an approval of a program less stringent than that described by part 70 requirements. Under section

²² *Ibid.*, and throughout.

²³ 40 CFR 70.4(d)(3).

²⁴ As explained in the Attorney General's Opinion, forthcoming State rules will remedy this limitation and an addendum to the opinion will be submitted once the rules are adopted.

70.4(d) the EPA proposes to set an expiration date for interim approval, not to exceed 2 years after such an approval and non-renewable upon expiration. If the EPA finalizes an interim approval of North Dakota's title V program, the interim approval's expiration date will be set for no later than January 1, 2021.

III. Delegation of NESHAP and MACT Requirements

A. Introduction

Section 112 of the CAA authorizes the EPA to develop and periodically revise a list of all categories and subcategories of major sources and area sources of hazardous air pollutants (HAP). To reduce HAP emissions from these sources, this section of the Act also authorizes the EPA to promulgate federally enforceable NESHAP and MACT requirements for source categories. The NESHAP and MACT requirements are promulgated in parts 61 and 63 of title 40 of the CFR. Section 112(l) of the Act provides a mechanism for approval of programs and delegation of authority to the states to implement and enforce these federal standards and requirements. A state's program may provide for partial or complete delegation of the Agency's authorities and responsibilities to implement and enforce section 112 standards and requirements, so long as those authorities are carried out by an approvable state program with standards and requirements no less stringent than those promulgated by the EPA. The regulations found in 40 CFR part 63, subpart E establish procedures consistent with section 112(l) for the approval of state rules, programs, or other requirements, as well as procedures for the delegation of authority to states to implement and enforce all section 112 federal rules as promulgated, without changes, after their incorporation into state code (40 CFR 63.91).

North Dakota first received straight delegation of authority to implement and enforce NESHAP and MACT requirements on July 7, 1995 (60 FR 35335) upon the parallel interim

approvals of the State's section 112 implementation and enforcement plan and the State's title V program.²⁵ The EPA subsequently informed North Dakota of the procedures for NESHAP and MACT automatic delegation.²⁶ An automatic delegation arrangement with a state allows for prospective approval of all delegations of authority to implement and enforce future section 112 standards and requirements without case-by-case approval, so long as the standards and requirements are incorporated unchanged into state code. North Dakota was operating under an automatic delegation arrangement prior to recodification of the State's section 112 program and the planned transfer of authority to implement and enforce state environmental regulations from the NDDH to the NDDEQ.²⁷

The NDDH's planned transfer of authorities pursuant to State law to a new State agency required minor revisions and the recodification of State rules and its section 112 program for implementation and enforcement of NESHAP and MACT requirements. The recodification of the State's program requires the State provide the Agency with a copy of the revised authorities and a formal request for approval measured against the criteria for approval found under 40 CFR 63.91(d) and any additional relevant approval criteria in 40 CFR part 63, subpart E.

In a letter dated August 6, 2018, North Dakota submitted to the EPA final revisions to the State's Air Pollution Control Rules pertaining to administration, implementation and enforcement of CAA section 112 emissions standards and requirements by the new NDDEQ. This letter included a request to approve straight delegation of all NESHAP and MACT requirements incorporated unchanged into the recodified State regulations, and a submittal

²⁵ Appendix A to 40 CFR part 70. *North Dakota* (b).

²⁶ See letter addressed to Director Jeff Burgess, Division of Environmental Engineering, North Dakota Department of Health from Director Richard R. Long, EPA Region 8 Air and Radiation Program, May 16, 2000, "Delegation Procedures for Section 112 Requirements," in the docket for today's notice.

²⁷ *Ibid.*

package justifying the approvability of the State's revised section 112 program. The EPA reviewed the State's program and recodified incorporations of federal requirements (NDAC chapters 33.1-15-12 and 33.1-15-22) for equivalency to the formerly approved implementation and enforcement program and former codification of federal requirements (NDAC chapters 33-15-12 and 33-15-22). The EPA also evaluated the submittal for approvability on the program's own merits as measured against the approval criteria found in subpart E of 40 CFR part 63. Additionally, we evaluated North Dakota's request for section 112 program approval based on the nine elements in the EPA's 1983 "Good Practices Manual for Delegation of NSPS and NESHAPs": 1) emission limits consistent with Federal regulations; 2) test methods consistent with federal regulations; 3) reporting and monitoring requirements; 4) enforcement; 5) waiver procedures; 6) surveillance; 7) public notification and disclosure of information; 8) resources; and 9) reporting to EPA.^{28, 29}

B. Analysis of State Submittal

Referring to a state's title V program final approval would normally satisfy the common approval criteria set forth for straight delegation of section 112 authorities to the state (40 CFR 63.91(d)(3)). However, North Dakota's title V program also underwent recodification during the proposed transfer of authority to the NDDEQ and was revised since EPA's final approval. Notice of proposed rulemaking action on the recodifications and revisions to North Dakota's title V program is found in Section II of today's proposed rulemaking document. Due to the concurrent nature of the title V revisions and recodifications and section 112 program recodifications and of

²⁸ For reference, this document may be found in the docket for today's notice.

²⁹ For a detailed demonstration of North Dakota's program adequacy following the program elements in the EPA's 1983 "Good Practices Manual for Delegation of NSPS and NESHAPs," see the NESHAP and MACT Program Descriptions, included in the submittal document, "Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality," please refer to section 2-3 (PDF pages 32-39), found in the docket for today's notice.

the EPA's simultaneous review of those revisions, the EPA evaluates the section 112 program recodifications against the criteria for stand-alone up-front completeness and approvability.

The North Dakota request for section 112 program approval was measured for completeness against all up-front approval criteria found under 40 CFR 63.91(d). These criteria as they were fulfilled by the State of North Dakota are: (1) a written finding by the State Attorney General that the NDDEQ has the necessary legal authority to implement and enforce the State's rules and source requirements upon program approval and to assure compliance by all sources within the State of North Dakota with each applicable section 112 standard or requirement (§63.91(d)(3)(i));³⁰ (2) a copy of all NDCC and NDAC statutes and regulations relevant to the implementation and enforcement by the NDDEQ of section 112 standards and requirements upon final program approval (§63.91(d)(3)(ii));³¹ (3) a narrative and graphical description of the NDDEQ, the agency's organization and the adequacy of its institutional resources to implement and enforce all aspects of the section 112 program upon approval (§63.91(d)(3)(iii));³² (4) a schedule demonstrating immediate implementation of the section 112 program upon final approval (§63.91(d)(3)(iv)); and, (5) a plan for expeditious compliance by all affected sources subject to the NDDEQ section 112 program upon final approval (§63.91(d)(3)(v)).

North Dakota provides the required items of 40 CFR 63.91(d)(3), and so fulfills the section 112 program submittal criteria set out by that section and the EPA's 1983 Manual, as outlined below.

³⁰ See submittal package document, "Attorney General's Opinion."

³¹ See submittal package document, "Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality" at sections 6 and 7.

³² *Ibid.* at sections 2, 3 and 5.

1. With respect to the State's legal authority to implement and enforce a section 112 program in the manner required under §63.91(d)(3)(i): sections VI, VII, XIV and XXII of the Attorney General's Opinion provides reference to the statutory source of the State's implementation and enforcement authority for administering a section 112 program.³³ As the transfer of authorities from the NDDH to the NDDEQ is almost exclusively a recodification of state laws and regulations, the EPA also refers to its previous determination that these legal authorities are adequate to carry out a section 112 program to determine that this legal authority is maintained by the NDDEQ.
2. Pursuant the requirement of §63.91(d)(3)(ii) that the submittal include a copy of all statutes, regulations, and requirements containing the appropriate provisions granting the authority to implement and enforce the state's section 112 program, including the related requirements in the EPA's 1983 Good Practices Manual (program elements 1-7)³⁴ the State has included such a copy of all relevant, recodified statutes and regulations. As there were no substantive modifications to these authorizing statutes and regulations, the EPA refers to its previous determination in the 1995 title V interim program approval that the NDDEQ has adequate authority to implement and enforce a section 112 program, just as the NDDH had before these recodifications.
3. Pursuant the requirement of §63.91(d)(3)(iii) that the State show adequate resources to implement and enforce all aspects of a section 112 program, the State notes in its submittal that the NDDEQ will be funded and staffed at the same level as the

³³ The NESHAP and MACT Program Descriptions in the submittal package document, "Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality," Sections 2 and 3 include information that meets several program elements in the EPA's 1983 Best Practices Manual, including, program elements 1, 2, 3, 4, 5, and 7.

³⁴ See the NESHAP and MACT Program Descriptions in the submittal package document, "Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality," Sections 1, 2 and 3.

Environmental Health Division of the NDDH which previously carried out all aspects of the section 112 program.³⁵

4. Pursuant to the requirements of §§63.91(d)(3)(iv) and (v), which require a demonstration of planned expeditious implementation and enforcement of the section 112 program, the State's submittal quotes a specific provision of Senate Bill 2327 that specifies that all "orders, determinations, and permits" made by the NDDH before the transfer of authority remain in effect. The NESHAPs and MACT Program Descriptions provide additional details regarding program implementation. As there will be a continuity in the orders, determinations and permit conditions that compose the section 112 program, there is no further need for implementation schedules or compliance plans as would be needed in an initial program approval. Pursuant to the EPA's 1983 Best Practices Manual program element for reporting to the EPA, the NESHAP and MACT Program Descriptions explain that the DEQ will report to the EPA as required by the Performance Partnership Agreement (PPA)³⁶ and Appendix A to part 61 (incorporated by reference in NDAC 33.1-15-13). The State's Descriptions further explain that the DEQ will work with the EPA to provide information on NESHAP and MACT sources that is requested by the EPA.

C. What NESHAPs are we proposing to delegate?

North Dakota's request included NESHAP in 40 CFR part 61 as they existed on July 2, 2010, and in 40 CFR part 63 as they existed through July 1, 2015.³⁷ This proposed delegation affects only the implementation and enforcement authority for those standards which had been

³⁵ See submittal package document, "Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality" at sections 1, 2, 3, and 5.

³⁶ See document titled, "ND PPA 2018-2019," in the docket for today's notice.

³⁷ See NDAC 33.1-15-13-01.1; 33.1-15-22-01.

previously delegated to the State under the previously approved program, and which have now been incorporated unchanged into the State's revised air pollution control rules.

The NDDEQ would maintain primary responsibility for the enforcement of the delegated section 112 standards within the State. If the NDDEQ determines that such enforcement is not feasible and so notifies the EPA, or on the occasion of the NDDEQ acting in a manner incongruous with the terms of this delegation arrangement, the EPA may exercise its parallel enforcement authority pursuant section 113 of the CAA with respect to sources within North Dakota subject to the section 112 hazardous air pollutant standards.

Additionally, some portions of the NESHAP/MACT standards and the associated general provisions may not be delegated to a state. The EPA retains authority over those portions of the section 112 standards and associated general provisions which may not be delegated. In general, the EPA will delegate to a state the authority to make decisions which are not likely to be nationally significant or to alter the stringency of the underlying standard. Pursuant to this goal, the EPA has codified those part 63 general provisions which may, and may not, be delegated to a state in 40 CFR 63.91(g). The EPA's complete reasoning for defining those provisions which are and are not delegable may be found in EPA's July 10, 1998 memorandum³⁸ or in the related Federal Register notice from January 12, 1999 (64 FR 1880). In addition, some portions of the section 112 requirements, by their own terms, may not be delegated to a state. The EPA Administrator retains authority of those sections of individual subparts that require: (1) approving equivalency determinations and alternate test methods; (2) decision-making to ensure national consistency; and (3) EPA rulemaking in order to implement. The document titled

³⁸ Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, "Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies," available online at: ([https://www3.epa.gov/airtoxics/112\(l\)/delauth9.pdf](https://www3.epa.gov/airtoxics/112(l)/delauth9.pdf)).

“Delegation of CAA Authorities Overview” in the docket for this proposal provides a list of example sections in 40 CFR parts 61 and 63 that may not be delegated. Additionally, this action does not propose delegation of any authority under section 112(r), the accidental release program. Accordingly, the EPA is retaining authority over those portions of the section 112 requirements that cannot be delegated.

If this delegation is finalized, all questions concerning implementation and enforcement of the excluded standards in the State of North Dakota should be directed to the EPA Region 8 Office.

D. How will statutory and regulatory interpretations be made?

If this NESHAP delegation is finalized, the State will obtain concurrence from the EPA on any matter involving the interpretation of section 112 of the CAA or 40 CFR parts 61 and 63 to the extent that implementation or enforcement of these provisions have not been covered by prior EPA determinations or guidance.

E. What authority does the EPA have?

The EPA retains the right, as provided by CAA section 112(l)(7) and 40 CFR 63.90(d)(2), to enforce any applicable emission standard or requirement under section 112. In addition, the EPA may enforce any federally approved state rule, requirement, or program under 40 CFR 63.90(e) and 63.91(c)(1)(i). The EPA also has the authority to make certain decisions under the General Provisions (subpart A) of parts 61 and 63. In addition, the EPA may review and disapprove state determinations and subsequently require corrections. *See* 40 CFR 63.91(g)(1)(ii). The EPA also has the authority to review a state's implementation and enforcement of approved rules or programs and to withdraw approval if we find inadequate implementation or enforcement. *See* 40 CFR 63.96. Furthermore, the Agency retains any

authority in an individual emission standard that may not be delegated according to provisions of the standard.

F. What information must the State provide to the EPA?

In addition to the information identified in the Performance Partnership Agreement, the State must provide any additional compliance related information to the EPA Region 8 Air Program within 45 days of a request under 40 CFR 63.96(a). In receiving delegation for specific General Provisions authorities, the State must submit to the EPA Region 8 on a semi-annual basis, copies of determinations issued under these authorities. *See* 40 CFR 63.91(g)(1)(ii). For part 63 standards, these determinations include: § 63.1, Applicability Determinations; § 63.6(e), Operation and Maintenance Requirements—Responsibility for Determining Compliance; § 63.6(f), Compliance with Non-Opacity Standards—Responsibility for Determining Compliance; § 63.6(h), Compliance with Opacity and Visible Emissions Standards—Responsibility for Determining Compliance; § 63.7(c)(2)(i) and (d), Approval of Site-Specific Test Plans; § 63.7(e)(2)(i), Approval of Minor Alternatives to Test Methods; § 63.7(e)(2)(ii) and (f), Approval of Intermediate Alternatives to Test Methods; § 63.7(e)(iii), Approval of Shorter Sampling Times and Volumes When Necessitated by Process Variables or Other Factors; § 63.7(e)(2)(iv), (h)(2) and (3), Waiver of Performance Testing; § 63.8(c)(1) and (e)(1), Approval of Site-Specific Performance Evaluation (Monitoring) Test Plans; § 63.8(f), Approval of Minor Alternatives to Monitoring; § 63.8(f), Approval of Intermediate Alternatives to Monitoring; §§ 63.9 and 63.10, Approval of Adjustments to Time Periods for Submitting Reports; § 63.10(f), Approval of Minor Alternatives to Recordkeeping and Reporting; and § 63.7(a)(4), Extension of Performance Test Deadline.

G. What is the EPA's oversight role?

The EPA oversees a state's decisions to ensure the delegated authorities are being adequately implemented and enforced. We will integrate oversight of the delegated authorities into the existing mechanisms and resources for oversight currently in place. If, during oversight, we determine that the State made decisions that decreased the stringency of the delegated standards, then the State shall be required to take corrective actions and the source(s) affected by the decisions will be notified, as required by 40 CFR 63.91(g)(1)(ii) and (b). We will initiate withdrawal of the program or rule if the corrective actions taken are insufficient.

H. Should sources submit notices to the EPA or the State?

For the delegated NESHAP standards and authorities covered by this proposed action, if finalized, sources would submit all of the information required pursuant to the general provisions and the relevant subpart(s) of the delegated NESHAP (40 CFR parts 61 and 63) directly to the State. The State is the primary point of contact with respect to delegated NESHAPs. Sources do not need to send a copy to the EPA. The EPA Region 8 proposes to waive the requirement that notifications and reports for delegated standards be submitted to the EPA in addition to the State in accordance with 40 CFR 63.9(a)(4)(ii) and 63.10(a)(4)(ii).³⁹ For those standards and authorities not delegated as discussed above, sources must continue to submit all appropriate information to the EPA.

I. How will unchanged authorities be delegated to the State in the future?

As stated in previous NESHAP delegation actions, the EPA has approved North Dakota's mechanism of incorporation by reference of NESHAP standards into the State regulations, as they apply to both part 70 and non-part 70 sources. *See, e.g.*, the EPA's 2000 memo to Director

³⁹ This waiver only extends to the submission of *copies* of notifications and reports; the EPA does not waive the requirements in delegated standards that require notifications and reports be submitted to an electronic database (*e.g.*, 40 CFR part 63, subpart HHHHHHHH).

Jeff Burgess, Division of Environmental Engineering, NDDH. All future section 112 requirements incorporated by reference (IBR) into the State rules will become effective on the date the requirement goes into effect according to the State's updated rules and regulations. In the case of future adoption of section 112 requirements, the EPA requests that North Dakota send notice of its intention to receive delegation of the requirements within 60 days of the State's incorporation of those requirements into the State's rules and regulations. The notification should include an official copy of the regulation stamped, dated and signed by the appropriate official, with the date of adoption and the effective date in North Dakota. Within 30 days of receipt of North Dakota's notification, the EPA will reply with an acknowledgment of the delegation and will change the relevant Region 8 electronic delegations of authority table (found under the "Delegations of Authority" link at: <http://www2.epa.gov/region8/air-program>) to reflect the new delegation of authority. If there is a change in the effective date for the section 112 requirement, North Dakota must notify the EPA as soon as possible. If the delay extends beyond the section 112 requirement compliance date, the EPA will implement and enforce the requirement until North Dakota has fully incorporated the requirement and the final effective date has passed.

The State also has the option of receiving partial delegation of a section 112 requirement, and the option to cancel the delegation of authority to implement and enforce previously adopted requirements. Automatic partial delegation of severable portions of any standard requires that the state: (1) clearly define the separable subcategory in the particular standard, or the specific separable subset of affected sources in the specific standard so that regulated sources and the public know who is the implementing and enforcing authority; and (2) the applicable portions of the federal standard must be adopted by IBR into the state regulations or rules with an additional, clear explanation of what portions of the standard are not included in the standard's adoption into

the State rule. If the State does not want to use automatic delegation for any of its previously adopted section 112 requirements, then the State may provide a list of those requirements which have been adopted and which the State wants to exclude from the delegation process to the EPA.

J. Proposed Action

The EPA proposes to approve North Dakota's program for receiving delegated authority to implement and enforce emissions standards and other requirements for air pollutants subject to section 112 of the CAA as recodified by the State. The EPA also proposes approval of revisions to the section 112 automatic delegation arrangement between the EPA and the State of North Dakota to accommodate the transfer of environmental regulatory programs from the NDDH to the NDDEQ. The proposed approval of recodification of federal NESHAP and MACT requirements and legal authorities to implement and enforce section 112 requirements, and the recognition of the NDDEQ's ability to receive delegated federal authority to administer the State's section 112 program will affect the transfer from the NDDH to the NDDEQ of the authority to implement and enforce all incorporated, unchanged federal NESHAP and MACT requirements.

IV. Delegation of NSPS

A. Introduction

Section 111 of the CAA authorizes the EPA to establish a list of source categories which contribute significantly to air pollution and authorizes the Agency to publish regulations establishing federal performance standards for new sources within such categories. Section 111 performance standards for new sources are categorically referred to as NSPS and may individually be found in 40 CFR part 60.

Section 111(c) of the Act establishes that the EPA may find a state program as “adequate” for purposes of implementing and enforcing the NSPS and delegate these authorities to the state. Delegation of authority confers upon the state primary implementation and enforcement responsibility; however, the EPA also retains concurrent authority to enforce the standards, and sole authority over those portions of the standards that may not be delegated. The usual method for establishing adequacy of a state’s program is to verify both the existence of an approved state title V permitting program and that the part 60 federal NSPS requirements are IBR in the state’s code. If these two program features can be positively verified, the state is considered capable of implementing and enforcing the section 111 standards and the state may request delegation of authority to administer the NSPS requirements for sources within the state. After section 111 program approval, a state and the EPA may reach an agreement to “automatically” delegate future NSPS requirements to the state, if the future requirements are IBR in the state’s code. Automatic delegation arrangements allow the state to administer the NSPS as they are updated or introduced without need for case-by-case approvals from the EPA. North Dakota and the EPA currently maintain such an arrangement.

The EPA last affirmed delegation of NSPS to North Dakota in a letter dated February 27, 2014,⁴⁰ which was subsequently published for public notice in the *Federal Register* on October 9, 2014 (79 FR 60993). Due to North Dakota’s creation of the NDDEQ by act of legislature, and revision and recodification of portions of the NDCC and NDAC to grant the Department legal authority to implement and enforce the State’s air pollution control rules, the EPA finds it necessary to revise the automatic delegation arrangement between the Agency and the State.

⁴⁰ See letter to Terry O’Clair, Director, Division of Air Quality, North Dakota Department of Health, “Automatic Delegation of Clean Air Act (CAA) Section 111 Requirements,” from Carl Daly, Director, Air Program, February 27, 2014.

As North Dakota is seeking approval of the transfer of its title V program to the NDDEQ concurrent with the State's revisions to its section 111 program, the EPA requested that the State demonstrate the adequacy of its program and resources for implementing and enforcing NSPS requirements independent of a fully approved operating permits program. The EPA evaluated the State's section 111 program based on the minimum program elements recommended in the Agency's 1983 "Good Practices Manual for Delegation of NSPS and NESHAPs."⁴¹ The requirements set forth by this document are a state's demonstrations of: (1) emission limits consistent with federal regulations; (2) test methods consistent with federal regulations; (3) reporting and monitoring requirements; (4) enforcement authority against noncomplying sources; (5) waiver procedures; (6) a source surveillance program; (7) a protocol for public notification and information disclosure; (8) adequate program resources; and (9) a communication protocol between a state and the EPA. North Dakota has included in its request for section 111 program approval a NSPS program description that seeks to demonstrate adequacy of the program with respect to each of the nine key program elements listed in this paragraph.

B. Analysis of State Submittal

The EPA reviewed North Dakota's section 111 program adequacy demonstration with reference to the "Good Practices" manual for NSPS delegations. The requirements of emission limits and test methods consistent with federal regulations, as well as the requirement of adequate source reporting and monitoring requirements, have been met with the IBR of federal NSPS requirements in the State air pollution control rules. The State updated all IBR citations as necessary. The EPA reviewed the State's incorporations and finds them substantively equivalent to incorporations as they existed at the time of the 2014 approval of NSPS delegation of

⁴¹ For reference, this document may be found in the docket for today's notice.

authority to the State during the NDDH's administration of North Dakota's environmental regulations.⁴² The State has made an adequate demonstration of enforcement authority in their program description and has provided a State Attorney General's opinion certifying the fullness of NDDEQ's enforcement authority and the adequacy of its source waiver and public notification and disclosure of information procedures. The EPA reviewed the relevant sections of State code related to enforcement and public notification, and finds them substantively equivalent to incorporations as they existed at the time the title V program received full approval. The State also made a sufficient demonstration of adequate program resources for the implementation and enforcement of the NSPS as they will have the same resources that were previously allocated by the State legislature that the EPA approved. The State's submittal also commits to reporting requirements under the Performance Partnership Agreement between the North Dakota and the EPA, as well as working with the EPA to provide information to the Agency.⁴³

C. What NSPSs are we proposing to delegate?

North Dakota's request included NSPS in 40 CFR part 60 as they existed through July 1, 2015.⁴⁴ This proposed delegation affects only the implementation and enforcement authority for those standards which had been previously delegated to the State under the previously approved automatic delegation program, and which have now been incorporated unchanged into the State's revised air pollution control rules.

⁴² For cross-referencing North Dakota's unchanged incorporations of federal NSPS requirements both before and after the transfer of authorities from the NDDH to the NDDEQ, see the document, "North Dakota NSPS Recodifications," included in the docket for today's notice.

⁴³ For a detailed demonstration of North Dakota's program adequacy following the program elements in the EPA's 1983 "Good Practices Manual for Delegation of NSPS and NESHAPs," see, "NSPS Program Description," included in the submittal document, "Title V Permit to Operate, MACT, NESHAPs and NSPS Programs for Department of Environmental Quality, Division of Air Quality," found in the docket for today's notice.

⁴⁴ NDAC 33.1-15-12-01.1.

The NDDEQ would maintain primary responsibility for the enforcement of the delegated section 111 standards within the State. If the NDDEQ determines that such enforcement is not feasible and so notifies the EPA, or on the occasion of the NDDEQ acting in a manner incongruous with the terms of this delegation arrangement, the EPA may exercise its parallel enforcement authority pursuant section 113 of the CAA with respect to sources within North Dakota subject to the section 111 new source performance standards.

There are some section 111 standards that may not be delegated to a state and which are not included in this automatic delegation arrangement. The emission guidelines (EG) found in 40 CFR part 60, subparts Cb, Cc, Cd, Ce, Cf, BBBB, DDDD, FFFF, and MMMM require states to develop implementation plans for ‘existing’ facilities of certain source categories, which are then approved under a separate process pursuant to section 111(d) of the CAA.

In addition, some portions of the section 111 standards and the associated general provisions of part 60, by their own terms, may not be delegated to a state. The EPA Administrator retains authority to implement those sanctions that require: (1) approving equivalency determinations and alternate test methods; (2) decision making to ensure national consistency; and (3) EPA rulemaking in order to implement. 40 CFR 60.4(d) also contains certain NSPS authorities that are not delegated to state and local agencies. Additionally, the document titled “INSERT” in the docket for this proposal contains a list of example sections in 40 CFR part 60 that may not be delegated to a state. Accordingly, EPA retains authority over those portions of the CFR part 60 standards that may not be delegated.

If this delegation is finalized, all questions concerning implementation and enforcement of the excluded standards in the State of North Dakota should be directed to the EPA Region 8 Office.

D. How will statutory and regulatory interpretations be made?

If this NSPS delegation is finalized, the State will obtain concurrence from the EPA on any matter involving the interpretation of section 111 of the CAA or 40 CFR part 60 to the extent that implementation or enforcement of these provisions have not been covered by prior EPA determinations or guidance.

E. What authority does the EPA have?

We retain the right, as provided by CAA section 111(c)(2), to enforce any applicable emission standard or requirement under section 111. We also retain any authority in an individual standard that may not be delegated according to provisions of the standard and retain the authorities stated in the preceding delegation agreement.⁴⁵ North Dakota first received approval to operate under an automatic delegation arrangement that was effective on December 8, 2014.⁴⁶ (See 79 FR 60993). The delegation tables as of now and how it would look if this proposal is finalized may be found in the docket for this action. The docket item “Delegation of CAA Authorities Overview,” also lists the authorities that cannot be delegated to any state or local agency.

F. What information must the State provide to the EPA?

The State must provide any information identified in the Performance Partnership Agreement to the EPA, in accordance with the terms of the Agreement.

G. What is the EPA's oversight role?

⁴⁵ See the EPA’s August 26, 2009 letter to Director Terry O’Clair, Division of Air Quality, North Dakota Department of Health, “Delegation of Clean Air Act New Source Performance Standards 2009”

⁴⁶ 79 FR 60993; October 9, 2014 (informing the public of EPA authorizing automatic delegation to North Dakota via letter from Carl Daly, Director Air Program, EPA Region 8, to Terry O’Clair, Director, Division of Air Quality, North Dakota Department of Health (February 27, 2014).

The EPA oversees the State's decisions to ensure the delegated authorities are being adequately implemented and enforced. We will integrate oversight of the delegated authorities into the existing mechanisms and resources for oversight currently in place. We will initiate withdrawal of the program or rule if the corrective actions taken are insufficient.

H. Should sources submit notices to the EPA or the State?

For the delegated NSPS standards and authorities covered by this proposed action, if finalized, sources would submit all of the information required pursuant to the general provisions and the relevant subparts of the delegated NSPS (40 CFR part 60) directly to the State. The State is the primary point of contact with respect to delegated NSPS. Sources do not need to send a copy to the EPA. For those standards and authorities not delegated as discussed above, sources must continue to submit all appropriate information to the EPA.

I. How will unchanged authorities be delegated to the State in the future?

As stated in previous NSPS delegation actions, the EPA has approved North Dakota's mechanism of incorporation by reference of NSPS standards into the State regulations, as they apply to both part 70 and non-part 70 sources. *See, e.g.,* 79 FR 60993. All future section 111 requirements IBR into the State rules will become effective on the date the requirement goes into effect according to the State's updated rules and regulations. In the case of future adoption of section 111 requirements, the EPA requests that North Dakota send notice of the State's intention to receive delegation of the requirements within 60 days of its incorporation of those requirements into the State's rules and regulations. The notification should include an official copy of the regulation stamped, dated and signed by the appropriate official, with the date of adoption and the effective date in North Dakota. Within 30 days of receipt of North Dakota's notification, the EPA will reply with an acknowledgment of the delegation and will change the

relevant Region 8 electronic delegations of authority table (found at: <http://www2.epa.gov/region8/air-program>) to reflect the new delegation of authority. If there is a change in the effective date for the section 111 requirement, North Dakota must notify the EPA as soon as possible. If the delay extends beyond the section 111 requirement compliance date, the EPA will implement and enforce the requirement until North Dakota has fully incorporated the requirement and the final effective date has passed.

The State also has the option of receiving partial delegation of a section 111 requirement, and the option to cancel the delegation of authority to implement and enforce previously adopted requirements. Automatic partial delegation of severable portions of any standard requires that the State: (1) clearly define the separable subcategory in the particular standard, or the specific separable subset of affected sources in the specific standard so that regulated sources and the public know who is the implementing and enforcing authority; and (2) the applicable portions of the Federal standard must be adopted by IBR into the State regulations or rules with an additional, clear explanation of what portions of the standard are not included in the standard's adoption into the State rule. If the State does not want to use automatic delegation for any of its previously adopted section 111 requirements, then the State may provide a list of those requirements which have been adopted and which the State wants to exclude from the delegation process to the EPA.

J. Proposed Action

With this notice of proposed rulemaking, the EPA is providing public notice and opportunity for public comment on the Agency's intention to approve revisions to the State of North Dakota's section 111 program for implementation and enforcement of NSPS requirements. The agency is also proposing straight delegation of all applicable implementation and

enforcement authorities necessary to regulate section 111 sources covered by the relevant subparts of 40 CFR part 60 incorporated unaltered into State code. This proposed delegation shall not be construed as extending to those part 60 subparts which cover existing sources that require EPA approval of a state plan that affects the implementation and enforcement of federal emissions guidelines for such source categories (section 111(d) sources); nor shall this proposed action be construed as delegating those authorities under section 111 of the Act and part 60 which are reserved by the Administrator of the EPA and not subject to delegation. The EPA is also proposing approval of revisions to the automatic delegation arrangement between the EPA and the State of North Dakota to accommodate the transfer of delegated NSPS implementation and enforcement from the NDDH to the NDDEQ.

V. Timing of Proposed Effective Dates

All revisions to the title V operating permits program, and section 111 and 112 programs would be federally enforceable as of the effective date of the EPA's approval of the respective revision and recodification of those programs, with the exception of the EPA's grant of interim approval of the part 70 program. The State plans to rely on the date when the EPA signs the final notice for purposes of notifying the state legislature that the EPA has approved these revisions, which will provide for the transfer authority from NDDH to NDDEQ to be effective under State law. Prior to the effective date of this approval, the State intends to take the necessary additional steps as specified in S.L. 2017, ch. 199, Section 1, to ensure that NDDEQ rules and the NDDEQ would become federally enforceable on the effective date of the EPA's approval. Unless and until the NDDEQ rules and agency become fully effective under federal law, for purposes of federal law the EPA recognizes the State's program as currently approved under the North Dakota Department of Health.

VI. Statutory and Executive Order Review

Under the CAA, the Administrator is required to approve:

- A state permit program submittal that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7661a(d); 40 CFR 70.1(c), 70.4(i). Thus, in reviewing permit program submittals, the EPA's role is to approve state choices, provided they meet the criteria of the CAA and the criteria, standards and procedures defined in 40 CFR part 70;
- A state program for receiving delegated authority to implement and enforce emission standards and other requirements for air pollutants subject to section 112 if such program complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7412(l); 40 CFR part 63, subpart E. Thus, in reviewing section 112 program submittals, the EPA's role is to approve state choices, provided they meet the criteria of the CAA and the criteria, standards and procedures defined in 40 CFR parts 61 and 63; and
- A state program for receiving delegated authority to implement and enforce emission limitations for new stationary sources subject to section 111 if such program complies with the provisions of the Act and applicable federal regulations. 42 U.S.C 7411(c). Thus, in reviewing section 111 program submittals, the EPA's role is to approve state choices, provided they meet the criteria of the CAA and implement the requirements, standards and procedures defined in 40 CFR part 60.

Accordingly, this action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because Operating Permits Program approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this action is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Parts 60, 61, 63, 70 and 72

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Title V, New source performance standards, National emission standards for hazardous air pollutants, Maximum achievable control technology, Delegation of authority.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: October 24, 2018 .

Douglas Benevento,
Regional Administrator,
EPA Region 8.

[FR Doc. 2018-23631 Filed: 10/29/2018 8:45 am; Publication Date: 10/30/2018]